FILE COPY

Office-Supreme Court, U.S.
FILED
JAN 16 1961
JAMES R. BROWNING, Clerk

NO. 653

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

GENERAL SHOE CORPORATION, PETITIONER

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILLIAM WALLER
American Trust Building
Nashville 3, Tennessee
Attorney for Petitioner

Of Counsel:
WALLER, DAVIS & LANSDEN
American Trust Building
Nashville 3, Tennessee

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statute Involved	2
Statement	2
Reasons for Granting Writ	5
Conclusion	12
Appendix	13

CITATIONS

Cases:

American Rolling Mill Co. v. Commissioner of Internal Revenue, 6 Cir., 41 F. 2d 314 — 8, 12

Campbell v. Prothro, 5 Cir., 209 F. 2d 331 — 8, 9

Commissioner of Internal Revenue v. Hallixell, 2 Cir., 131 F. 2d 642 — 10

Commissioner of Internal Revenue v. Marshman, 6 Cir., 279 F. 2d 27 — 3, 4, 6, 9

Commissioner of Internal Revenue v. Mesta, 3 Cir., 123 F. 2d 986 — 4, 6, 9, 10

Eisner v. Macomber, 252 U. S. 189 — 11

Elgin National Watch Co., 17 B. T. A. 339 — 7

General Utilities Co. v. Helvering, 296 U. S. 200 — 6, 11, 12

Helvering v. Walbridge, 2 Cir., 70 F. 2d 683 — 9, 10

Hibbard, Spencer, Bartlett & Co., 5 B. T. A. 464 — 7

Hirsch v. Ward Baking Co., 7 Cir., 155 F. 2d 257 — 11

International Freighting Corporation, Inc. v. Commissioner of Internal Revenue, 2 Cir., 135 F. 2d 310 — 10

Kenan v. Commissioner of Internal Revenue, 2 Cir., 114 F. 2d 217 10

Lincoln Electric Co., 6 T. C. 37, reversed, *sub nom. Commissioner of Internal Revenue v. Lincoln Electric Co.*, 6 Cir., 176 F. 2d 815 7

Lucas v. Ox Fibre Brush Co., 281 U. S. 115 5,6

National Latex Products Co. v. Sun Rubber Co., 6 Cir., 276 F. 2d 167 4

United States v. Cumberland Public Service Co., 338 U. S. 451 8

Western Pacific Railroad Corp., et al. v. Western Pacific Railroad Co., et al., 345 U. S. 247 4

Statutes:

Internal Revenue Code of 1939,
- Section 22 (a) 5
- Section 22 (f) 5
- Section 23 (a) 7,8
- Section 23 (p) 3,7,8
- Section 23 (q) 7,8
- Section 111 2,3,5,6,9,10,11
- Section 1002 10

Internal Revenue Code of 1954,
- Section 1001 11
- Section 2512 (b) 10

Revenue Act of 1935,
- Section 102 (c) 8

28 U. S. C.,
- Section 46 4
- Section 1254 (1) 1

Miscellaneous:

Williston on Contracts,
(Revised Edition), Volume 1,
sec. 130 (B) 11

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

GENERAL SHOE CORPORATION, PETITIONER

VS.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to The United States Court of Appeals for the Sixth Circuit

General Shoe Corporation (now Genesco, Inc.) petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit in this case (No. 13,914 below).

OPINION BELOW

The opinion of the Court of Appeals (App., *infra*, pp. 13–22), is reported at 282 F. 2d 9.

JURISDICTION

The judgment of the Court of Appeals was entered on September 2, 1960 (App., *infra*, p. 22). Petition for rehearing was filed and denied December 1, 1960. (App., *infra*, p. 23). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED

Whether the petitioner, General Shoe Corporation, realized taxable gain when it transferred to its Employees Retirement Trust property having a fair market value in excess of adjusted basis.

STATUTE INVOLVED

Internal Revenue Code of 1939:

Sec. 111. Determination of Amount of, and Recognition of, Gain or Loss.

(a) Computation of Gain or Loss.—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) Amount Realized.—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

* * * *

(26 U. S. C. 1952 ed., Section 111.)

STATEMENT

In 1945, petitioner, General Shoe Corporation, established an employees' retirement plan and created a trust to implement the plan. Contributions are made only by the employer, and benefits are provided for employees who retire at a specified retirement age after specified minimum periods of service. The petitioner has no legal obligation to make contributions to the trust, and expressly reserved the right to discontinue contributions at any time. Employees receive no vest-

ing of any benefits at any time except on retirement or upon termination and liquidation of the trust. No method of funding is prescribed by the plan. Contributions are made as determined by the Board of Directors.

In its fiscal years 1951 and 1952 the petitioner transferred real property to the trust, consisting of land and factory buildings. The petitioner simultaneously leased these properties back from the trust. In its tax returns for these years the petitioner claimed and was allowed a deduction of the fair market value of these properties (Internal Revenue Code of 1939, Section 23(p)), but a capital gains tax was assessed, measured by the difference between fair market value and adjusted basis. Petitioner paid the taxes, filed timely claims for refund which were disallowed, and thereupon filed an action in the United States District Court for the Middle District of Tennessee. The District Court awarded a judgment in favor of the petitioner, which the government appealed to the Court of Appeals for the Sixth Circuit, resulting in a reversal.

Following the argument and submission of this case in the Court of Appeals, there were argued and submitted to the same Court, but one composed of different judges, three companion cases (Nos. 13944-5-6) involving the question whether taxable gain was realized by a husband when he transferred appreciated property to his estranged wife in exchange for her release of marital rights. On May 31, 1960 the Court held that the husband did not receive taxable gain, and that the wife (who had remarried) took the husband's basis, reversing Tax Court decisions to the contrary. *Commissioner of Internal Revenue v. Marshman*, 6 Cir., 279 F. 2d 27. The Court of Appeals in *Marshman* held that the fair market value of the property *received* by the taxpayer (not that of the property disposed of) is the criterion under Section 111,

and that fair market value is the price at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell. The Court rejected the principle of *Commissioner of Internal Revenue v. Mesta*, 3 Cir., 123 F. 2d 986, that one is presumed to get his "money's worth" when he transfers property for consideration, and hence realizes taxable gain.

Despite the *Marshman* decision, the Court reversed the judgment of the District Court in the instant case, holding (1) that the District Court was in error in holding that petitioner received no money or property within the meaning of Section 111 in return for its contribution of properties to the trust, because petitioner received intangible benefits which constituted property, and (2) that applying the *Mesta* principle, the fair market value of these intangible benefits was the equivalent of the fair market value of the properties contributed to the trust. In explanation of why the Court applied the *Mesta* principle in the instant case, after rejecting it in *Marshman*, the Court said: "This is an arm's length situation. No emotional factors are involved. The measurement of the intangible benefits is easily reduced to dollars and cents." (App., *infra*, p. 21). Contending that the two decisions were actually in conflict, the petitioner herein filed a petition for rehearing, suggesting (in accordance with what counsel understood to be approved practice[1]) that it be considered by the Court *en banc* pursuant to 28 U. S. C., Section 46. The division of the Court which originally heard the case rejected the *en banc* suggestion, citing *National Latex Products Co. v. Sun Rubber Co.*, 6 Cir., 276 F. 2d 167, and denied the petition. (App., *infra*, p. 23).

[1] *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U. S. 247, 268.

Petitions for certiorari filed by the losing parties in *Marshman* (Nos. 366 and 512) were denied on December 12, 1960.

REASONS FOR GRANTING THE WRIT

The question involved is one of wide importance. Many corporations have established pension trusts or profit-sharing trusts for employees and have contributed, or plan to contribute, property to the trusts. Moreover, the decision of the Court of Appeals brings into question the status of charitable gifts of appreciated property.

The Court of Appeals decided the case on a theory not advanced by the government in either the District Court or the Court of Appeals. Evidently recognizing that the taxpayer received neither money nor property within the meaning of Section 111, Internal Revenue Code of 1939, the government argued that Section 111 should not be read as a limitation upon what would otherwise be considered "gain" under Section 22(a). The government's contention was succinctly stated as follows (Appellant's Court of Appeals Brief, pp. 16–17):

> " . . . Section 22(f) refers to Section 111 as providing for the *computation* of gain or loss. Section 111(a) also deals only with the computation of amount. Likewise Section 111(b) is a statement as to the amount realized. As to *whether* there has been a realization of gain or loss these provisions are silent; that question is determined under Section 22(a)."

The Court of Appeals disregarded this argument without comment,[2] but proceeded to hold that there was

[2] Section 22(a) provides that "gross income" includes "gains . . . derived from . . . dealings in property . . .". Section 22(f) provides, however: "In the case of a sale or other disposition of property, the gain or loss shall be computed as provided in Section 111." If the gain computed under Section 111 is zero, there is no gain under Section 22(a).

and that fair market value is the price at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell. The Court rejected the principle of *Commissioner of Internal Revenue v. Mesta*, 3 Cir., 123 F. 2d 986, that one is presumed to get his "money's worth" when he transfers property for consideration, and hence realizes taxable gain.

Despite the *Marshman* decision, the Court reversed the judgment of the District Court in the instant case, holding (1) that the District Court was in error in holding that petitioner received no money or property within the meaning of Section 111 in return for its contribution of properties to the trust, because petitioner received intangible benefits which constituted property, and (2) that applying the *Mesta* principle, the fair market value of these intangible benefits was the equivalent of the fair market value of the properties contributed to the trust. In explanation of why the Court applied the *Mesta* principle in the instant case, after rejecting it in *Marshman*, the Court said: "This is an arm's length situation. No emotional factors are involved. The measurement of the intangible benefits is easily reduced to dollars and cents." (App., *infra*, p. 21). Contending that the two decisions were actually in conflict, the petitioner herein filed a petition for rehearing, suggesting (in accordance with what counsel understood to be approved practice[1]) that it be considered by the Court *en banc* pursuant to 28 U. S. C., Section 46. The division of the Court which originally heard the case rejected the *en banc* suggestion, citing *National Latex Products Co. v. Sun Rubber Co.*, 6 Cir., 276 F. 2d 167, and denied the petition. (App., *infra*, p. 23).

[1] *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U. S. 247, 268.

Petitions for certiorari filed by the losing parties in *Marshman* (Nos. 366 and 512) were denied on December 12, 1960.

REASONS FOR GRANTING THE WRIT.

The question involved is one of wide importance. Many corporations have established pension trusts or profit-sharing trusts for employees and have contributed, or plan to contribute, property to the trusts. Moreover, the decision of the Court of Appeals brings into question the status of charitable gifts of appreciated property.

The Court of Appeals decided the case on a theory not advanced by the government in either the District Court or the Court of Appeals. Evidently recognizing that the taxpayer received neither money nor property within the meaning of Section 111, Internal Revenue Code of 1939, the government argued that Section 111 should not be read as a limitation upon what would otherwise be considered "gain" under Section 22(a). The government's contention was succinctly stated as follows (Appellant's Court of Appeals Brief, pp. 16-17):

> " . . . Section 22(f) refers to Section 111 as providing for the *computation* of gain or loss. Section 111(a) also deals only with the computation of amount. Likewise Section 111(b) is a statement as to the amount realized. As to *whether* there has been a realization of gain or loss these provisions are silent; that question is determined under Section 22(a)."

The Court of Appeals disregarded this argument without comment,[2] but proceeded to hold that "there was

[2] Section 22(a) provides that "gross income" includes "gains . . . derived from . . . dealings in property . . ." Section 22(f) provides, however: "In the case of a sale or other disposition of property, the gain or loss shall be computed as provided in Section 111." If the gain computed under Section 111 is zero, there is no gain under Section 22(a).

"economic gain" to the employer from making contributions to the trust because such a trust is a "stimulus to continued effort" of employees (citing *Lucas v. Ox. Fibre Brush Co.*, 281 U. S. 115, 119). The Court went on to say that "we do not conceive that in this day and age we are restricted to tangibles in tax matters where there is actual recognizable benefit, albeit intangible, the taxation of which is implicit in the statutory scheme, and where such benefit is clearly capable of being evaluated on an objective basis." (App., *infra*, pp. 19-20). That is to say, the Court regarded this intangible benefit as "property received" within Section 111, and then attributed to it a fair market value equivalent to the fair market value of the property contributed to the trust, applying the *Mesta* principle.

Since the government had not argued that the intangible benefit to an employer from making contributions to a pension trust constitutes "property received," the petitioner had no opportunity to present evidence or argument, such as was presented in *Marshman*, with respect to the difficulty of evaluating the fair market value of this "property."[3] The benefit in question cannot realistically be measured by the fair market value of the property contributed, because the value of a pension trust to the employer may depend upon such factors as the ages of the employees and the normal rate of employment turnover. All other things being equal, the assets in such a trust, together with future accumulations of income, may be entirely sufficient to fund all requirements if the employees have an average age of thirty-

[3] Cf. *General Utilities Co. v. Helvering*, 296 U. S. 200, 206, where this Court said, in reversing a decision of a Circuit Court of Appeals, which had reversed a decision of the Board of Tax Appeals on a ground not presented to or ruled upon by the Board: ". . . Always a taxpayer is entitled to know with fair certainty the basis of the claim against him. Stipulations concerning facts and any other evidence properly are accommodated to issues adequately raised."

five, but quite insufficient if the employees have an average age of fifty.

In the courts below the government sought to distinguish cases involving charitable gifts of appreciated property, deductible under Section 23(q), on the theory that contributions to a pension trust constitute payment of compensation to employees for services rendered so that the taxpayer receives a *quid pro quo*. The Court of Appeals correctly disregarded this contention;[4] but the Court's own theory, that a capital gain is realized in the contribution of appreciated property to a pension trust because an intangible benefit results to the employer, could just as easily be applied to many charitable gifts. For example, if an employer contributes property to a church attended by employees, an intangible benefit would presumably result, but not if the contribution is to some other church. Again, if a contribution is made to the *alma mater* of an important customer, an intangible benefit might result, but not if the contribution is made to some other college.

The analogy between contributions to a pension trust and charitable contributions is evident from the historical background of Sections 23(p) and 23(q) of the Internal Revenue Code of 1939. Prior to the Revenue Act of 1928, there was no specific provision in the law authorizing the deduction of payments made to a trust of the character here involved. The deductions were taken under Section 23(a) as ordinary and necessary expenses.[5]

[4] While contributions to a trust which are immediately allocated to individual employees, and are non-forfeitable, would admittedly be in the nature of compensation to employees, this is not true where, as here, there is no vesting in individual employees until they actually retire or until the plan is terminated. *Lincoln Electric Co.*, 6 T. C. 37, reversed on other grounds, 6 Cir., 176 F. 2d 815.

[5] See *Hibbard, Spencer, Bartlett & Co.*, 5 B.T.A. 464; *Elgin National Watch Co.*, 17 B.T.A. 339. Section 23(q), Revenue Act of 1928, was the antecedent of Section 23(p) of the Internal Revenue Code of 1939.

Not until the Internal Revenue Code of 1939 did it become mandatory that all deductions of payments to a qualified trust be taken under Section 23(p) rather than 23(a). Similarly, there was no statutory authority prior to the Revenue Act of 1935 for deductions by corporations of charitable contributions which did not meet the test of being ordinary and necessary expenses. Unless they were deductible under Section 23(a), they were not deductible at all.[6]

The Court of Appeals, in the instant case, was of the opinion that "the taxpayer realized exactly the same gain here by transferring the real estate as it would have had it sold the real estate for the fair market (or appraised) value and contributed the funds to the trust." The Court's theory was that otherwise the taxpayer would be permitted to employ a "device" to "circumvent the capital gains tax." (App., *infra*, p. 19). This theory would be equally applicable to all charitable contributions in kind, whether an intangible benefit results to the donor or not. Actually there was no sale of the properties by anyone. The trust leased them back to the corporation. This was no "device," but a legitimate business transaction. Moreover, the theory of the Court of Appeals is in direct conflict with *United States v. Cumberland Public Service Co.*, 338 U. S. 451, and many other cases applying the principle that a taxpayer has a lawful right to minimize taxes.

One of the most recent cases involving charitable contributions in kind is *Campbell v. Prothro*, 5 Cir., 209 F. 2d 331, where the Court said (p. 336):

"We come back, then, to the point of departure. Were the calves when transferred by gift to the Y

[6] See *American Rolling Mill Co.* v. *Commissioner of Internal Revenue*, 6 Cir., 41 F. 2d 314. Section 102(c), Revenue Act of 1935, amended the Revenue Act of 1934 by adding Section 23(r), which was the antecedent of Section 23(q) of the Internal Revenue Code of 1939.

M.C.A. realized income to the appellees in the taxable sense. We think it clear that they were not. If they were, then every appreciation in value of property passing by gift is realized income. We know that this is not so, and that, though it is and has been the contention of the Bureau that it ought to be, Congress has never enacted legislation so providing."

The instant decision is irreconcilable with *Helvering v. Walbridge*, 2 Cir., 70 F. 2d 683. In that case the taxpayer, Walbridge, contributed shares of stock to a newly formed partnership in exchange for an interest in the partnership. The Commissioner contended that the taxpayer realized a gain in the amount of the difference between the price at which the shares had been taken by the firm and their cost to him. The Court, speaking through Circuit Judge L. Hand, affirmed the decision of the Board in favor of the taxpayer, saying (p. 684):

> " . . . In the case at bar Waldridge's share in this firm, engaged in marketing securities, was not 'marketable'; the assumption is wholly unfounded that it was worth the value of his contribution . . . "

If a share in a partnership is not property having a fair market value within Section 111(b), how can it fairly be said that the intangible benefit to an employer from making contributions to a pension trust constitutes such property? Emotional factors such as those involved in *Marshman* were not present in *Walbridge*. Moreover, in *Walbridge* the partnership interest was unquestionably "property received," within Section 111, just as in *Mesta*, and similar cases, the wife gave up, and the husband received, property consisting of her marital rights, so that the only question was whether or not this property had a fair market value as required by Section 111. In the instant case, the trust gave up no property, and the taxpayer received none from the trust. The in-

tangible benefit or economic gain to the taxpayer was not a part of an exchange, such as Section 111 contemplates, even if it can properly be considered to be "property" at all.

International Freighting Corporation, Inc. v. Commissioner, 2 Cir., 135 F. 2d 310, cited by the Court of Appeals in the instant case, involved payment of bonuses to employees in the form of shares of stock which had appreciated in value. The Court held that taxable gain was realized by the employer. If the employees who received the bonuses had a right to receive them, the decision was a proper application of Section 111, because the employer received the discharge of a legal obligation, which was the equivalent of the receipt of money, as in *Kenan v. Commissioner*, 2 Cir., 114 F. 2d 217.[7] However, the Court actually treated the case as if the employees had been previously paid in full for their services, so that the company was under no legal obligation to pay the bonuses, saying, however, that there was "sufficient consideration" for the payment of the bonuses, and quoting the "money's worth" phraseology of *Mesta*. But Section 111 does not mention "consideration" or "money's worth."[8] Hence we submit that the District Court, in the instant case, was correct in refusing to follow *International Freighting*, pointing out in the conclusions of law that "the Court lost sight of the statute requiring as a prerequisite to liability for a capital gains tax receipt by the taxpayer of either 'money' or 'property'." (App.,

[7] The Second Circuit had previously followed *Mesta* in *Commissioner v. Halliwell*, 2 Cir., 131 F. 2d 642 (involving the transfer of appreciated securities by a husband to a wife pursuant to a divorce decree), citing *Kenan*, but failing to cite *Walbridge*. Nor was *Walbridge* cited by the division of the Court which decided *International Freighting*.

[8] Cf. Section 1002, Internal Revenue Code of 1939 (Section 2512(b), Internal Revenue Code of 1954), defining a gift for gift tax purposes to include a transfer of property "for less than an adequate and full consideration in money or money's worth."

infra, p. 16). Moreover, as the District Court also suggested, bonus payments are upheld not because they are made for consideration, but because they constitute completed transactions.[9]

The decision in the instant case is at variance with *Eisner v. Macomber*, 252 U. S. 189, holding that unrealized appreciation is not taxable income, and with *General Utilities Co. v. Helvering*, 296 U. S. 200, where the Commissioner of Internal Revenue unsuccessfully argued that a corporate dividend payable in shares of another company, which had increased in value, was "in effect a cash dividend," so that the company realized taxable income "equal to the difference between the amount of the dividend declared and the cost of the stock." (p. 204). The corporation would, of course, have realized gain if it had sold the shares and distributed the proceeds, just as in each of the Courts of Appeals' cases above cited, taxable gain would have been realized if the taxpayer had sold the property and disposed of the proceeds instead of disposing of the property itself.

General Utilities established the principle that gain is not *realized* when appreciated property is transferred without consideration, for the reason that, in the case of such a transfer, there is no receipt of money (in the broad sense) through the discharge of indebtedness. (296 U. S. 206). This decision, by a unanimous court, seems to leave no room for the theory evolved by the Court of Appeals in the instant case that an "intangible benefit" resulting to the transferor from the donation or contribution of property (but not received in exchange for the property) may qualify as "property received," which may

[9] See Williston on Contracts (Revised Edition), Volume 1, sec. 130(B); cf. *Hines v. Ward Baking Co.*, 7 Cir., 155 F. 2d 257, to the effect that after a contract is fully executed it is immaterial that it lacked consideration and was not enforceable while still executory.

then be conclusively presumed to have a "fair market value" equivalent to that of the property donated or contributed. In view of its many ramifications, the question is an important one which should be settled by this Court, whether or not the instant decision, involving not a dividend in kind but a contribution of property to a trust, be regarded as in direct conflict with *General Utilities*, as we believe it to be.[10]

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

WILLIAM WALLER
American Trust Building,
Nashville 3, Tennessee,
Attorney for Petitioner.

Of Counsel

WALLER, DAVIS & LANSDEN,
American Trust Building,
Nashville 3, Tennessee.

[10] The intangible benefits to a corporation resulting from the payment of dividends, whether in cash or in kind, include the greater marketability of its stock, which may enable it to acquire additional assets in exchange for stock on an advantageous basis. It could be argued that there should be some intangible benefit to an ordinary business corporation from every *intra vires* disposition of property made by it, because such a corporation cannot act from purely altruistic motives even in making charitable donations. See *American Rolling Mill Co. v. Commissioner of Internal Revenue, infra*, footnote 6.

APPENDIX

No. 13914

United States Court of Appeals

For the Sixth Circuit

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. GENERAL SHOE CORPORATION, *Defendant-Appellee.*	ON APPEAL from the Judgment of the United States District Court for the Middle District of Tennessee.

Decided September 2, 1960

Before: McALLISTER, Chief Judge, POPE, Circuit Judge, and THORNTON, District Judge.

THORNTON, District Judge. The facts in this tax case are not in dispute in any degree important to disposition on appeal.

The issue here for determination is new to this Court except perhaps for an apparent similarity between it and that present in a case decided by this Court May 31, 1960.[1] We believe that there is a distinction of a fundamental nature between that case and this one. We shall advert to this distinction later on in this opinion.

For purposes of this appeal, a broad outline of the facts will suffice. In view of our treatment of the problem, we

[1] *Commissioner of Internal Revenue* v. *Marshman, et al.*, 279 F. 2d 27.

deem it unnecessary to go into the details which the District Court necessarily had to include in his findings of fact and conclusions of law. We affirm those findings. They constitute an excellent presentation of the factual background which revolves around the plan of appellee, hereafter referred to as the taxpayer, to create a pension or retirement trust for the benefit of its employees. The taxpayer did, in fact, execute such a plan which consists of a trust to which the taxpayer contributed assets. We are here concerned with assets contributed during the fiscal years 1951 and 1952, and taken as deductions by the taxpayer on its corporate tax returns for such years. These assets consisted of two parcels of real estate located at or near Atlanta, Georgia, appraised at $160,000 and $250,000, respectively, at about the time of the contributions. Another parcel in Atlanta was contributed, and its value was determined to be $37,500 (based on the sale of it by the trust). The last such contribution with which we are concerned is real estate located at Huntsville, Alabama, and appraised at $600,000. The appellant, hereafter referred to as the Government, put in issue by amended answer (1) these market values, (2) whether they were actually contributed to the trust during the taxable years for which deductions were taken, and (3) whether the trust was a qualified trust "exempt from taxation under Section 165(a), Internal Revenue Code of 1939, so that contributions are deductible under Section 23(p)." The District Court found, and we think correctly, for the taxpayer on all three questions. The Government accepts such findings for purposes of this appeal so we will not concern ourselves with them. We observe, however, that these findings have been most carefully prepared.

In its conclusions of law, the District Court concludes as follows, and we quote the six paragraphs comprising the conclusions:

"CONCLUSIONS OF LAW

"1. The Court has jurisdiction of the parties and subject matter herein by virtue of Section 7422 of the Internal Revenue Code of 1954, and Sections 1340 and 1346, Title 28, United States Code.

"2. Plaintiff's Employees Retirement Trust complied with the provisions of Section 165(a) of the Internal Revenue Code of 1939, with the result that contributions to the trust by plaintiff in the years ending October 31, 1951 and October 31, 1952, respectively, were properly deductible under Section 23(p). The law does not require that the employer have a legal obligation to make contributions to a trust in order for the trust to be exempt. *Lincoln Electric Co. Employees' Profit Sharing Trust, et al. v. Commissioner of Internal Revenue* (C. A. 6, 1951), 190 F. 2d 326. Having made no misrepresentation to the Treasury Department, it was an abuse of discretion to rule in 1958 that the plan and trust did not conform to Section 165(a). *H. S. D. Co. v. Kavanagh* (C. A. 6, 1951), 191 F. 2d 831. The ruling letter of February 11, 1958, holding that the plan does not meet the requirements of Section 165(a) of the 1939 Internal Revenue Code of Section 401(a) of the 1954 Code and that the trust is not qualified under said sections and is not exempt from taxation was based on an erroneous view of the law and is of no effect.

"3. The plaintiff was entitled to the deductions on its income tax returns for the years ending October 31, 1951 and October 31, 1952, respectively, representing the fair market values of the properties contributed to the trust, to wit: $160,000 for the Lawrenceville, Georgia property and $250,000 for the Caroline Street, Atlanta, property, in 1951, and $37,500 for the Yonge Street, Atlanta, property, and $600,000 for the Huntsville, Alabama property in 1952.

"4. Section 111(a), Internal Revenue Code of 1939 provides that the 'gain from the sale or other disposition of property, [which is included in the definition of 'gross income' contained in Section 22(a)] 'shall be the excess of the amount realized therefrom over the adjusted basis . . .' Section 111(b) provides:

> 'Amount Realized. The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.'

In contributing these properties to the trust, the plaintiff did not receive any money, and did not receive the equivalent of money since no debt or legal obligation was discharged; it did not receive any 'property' having 'fair market value' within the meaning of said section; and hence there was no 'amount realized' from the contributions to the trust. That being the case, there was no taxable gain.

"5. The case of *International Freighting Corporation v. Commissioner of Internal Revenue*, 2d Cir., 135 F. 2d 310, relied on by the defendant, should not in the opinion of the Court be followed or applied in the present case. A careful analysis of the opinion in that case compels the conclusion that the Court lost sight of the statute requiring as a prerequisite to liability for a capital gains tax receipt by the taxpayer of either 'money' or 'property.' The decision was based upon the court's theory of consideration, which theory itself is subject to question, rather than upon the receipt of 'property' as required by the basis statute. It it not contended, of course, that the taxpayer received 'money,' nor is the Court able to find from the facts of the case that it received 'property' within the meaning of the statute, whatever may be said about consideration. While the decision of the Court of Appeals

of another circuit is persuasive, it should not be followed where it is clear that the decision itself constitutes a departure from the controlling statute.

"6. Plaintiff is entitled to judgment for the amount of taxes paid by it as the result of the erroneous assessment of capital gains taxes on the contributions of real estate to its Employees Retirement Trust, plus the interest paid by plaintiff on said amount, and also for interest as allowed by law, and for allowable costs."

We find ourselves in complete agreement with the District Judge in his conclusions of law numbered 1, 2 and 3. We think the law is clearly to the effect that a pension or retirement plan such as was here established complied with the Code so as to enable the taxpayer to deduct (under Section 23 (p)) contributions made by the taxpayer to the trust. The fact that the taxpayer was not obligated in this respect does not preclude it from taking the deduction, nor the trust income from being exempt from taxation. The District Court made proper conclusions of law in this respect. This court, in *Lincoln Electric Co. v. Commissioner*, 6 Cir., 190 F. 2d 326, determined the *exemption* issue, and in *Lincoln Electric Co. v. Commissioner*, 6 Cir. 162 F. 2d 379, determined the *deduction* one in opinions written by Judge Simons. In an opinion written by Judge Miller of this Court in 1950,[2] the same reasoning is applied as in the earlier *Lincoln Electric* case cited, and the same conclusion is reached re deductibility from gross income as an ordinary and necessary business expense.

It is with the conclusions of law numbered 4–6 that we find ourselves in disagreement with the court below, and as to which we must reverse.

A few details of factual background as to the capital

---

[2] *Commissioner* v. *Surface Combustion Corp.*, 6 Cir., 181 F. 2d 444.

gains feature of the case, as distinct from the trust-contribution-deduction feature, are here in order. When the taxpayer made the real estate contributions to the trust it took deductions on its corporate income taxes in the amounts of the appraised values of these properties. These deductions were allowed, but a capital gains tax was assessed, measured by the difference between the assessed valuation (or fair market value) and the basis. The taxpayer paid these capital gains taxes and filed timely claims for refund. Said claims were disallowed and this action is the result. The District Court agreed with the taxpayer that it had not realized a *taxable* capital gain. We believe that this was an erroneous view of the law. We think that the rationale of *International Freighting Corporation v. Commissioner of Internal Revenue*, 2d Cir., 135 F. 2d 310 is persuasive. We recognize, of course, that the decision there is not controlling, and we do not here hold that the court below was bound by it as such. We can hardly state the rationale of that decision better than Judge Frank did in his short succinct opinion in *Freighting*. When the taxpayer *here* made the contributions to the trust it was entitled to take, and did take deductions for such contributions as "ordinary and necessary" expenses. When the taxpayer evaluated the contributions on the basis of the then current market value and used those figures for its deductions, it then realized capital gain to the extent that such values exceeded its basis. There is no gainsaying this logic. The tax statutes do not operate in theory—they are practical. The disposition of the real estate by the taxpayer resulted in an "amount realized" within the meaning of Section 111(b)—

> "Amount Realized. The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received."

The taxpayer realized exactly the same gain here by transferring the real estate as it would have had it sold the real estate for the fair market (or appraised) value and contributed the funds to the trust. Would the taxpayer say that if it had sold the real estate that there would have been no taxable capital gain in this situation? Can a taxpayer circumvent the capital gains tax by such a simple device? In *Helvering v. Horst*, 311 U. S. 112, 115 the court says that "Where the taxpayer does not receive payment of income in money or property realization may occur when the last step is taken by which he obtains the fruition of the economic gain which has already accrued to him." In *Lucas V. Ox Fibre Brush Co.*, 281 U. S. 115, 119 Mr. Chief Justice Hughes, directing his attention to the issue of the reasonableness of extra compensation for work done, referred to payments made "as a matter of internal policy having appropriate regard to the advantage of recognition of skill and fidelity as a stimulus to continued effort." Surely the same considerations are present in relation to a plan whose purpose is as stated in the present case:

> "ARTICLE I: PURPOSE
>
> The purpose of this Plan is to provide for the accumulation of a fund to pay annuities to regular employees of the Corporation upon retirement because of age or disability after a period of faithful service with the Corporation, and to supplement the benefits provided under the Federal Social Security Act."

The theory of economic gain comes into play. To argue, as the taxpayer does here, that there can be no gain because nothing is realized, is unrealistic. Literally the taxpayer is correct in its contention that it did not receive a tangible benefit . . . however, we do not conceive that in this day and age we are restricted to tangibles in tax matters where there is actual recognizable benefit,

albeit intangible, the taxation of which is implicit in the statutory scheme, and where such benefit is clearly capable of being evaluated on an objective basis. It is at this point in our discussion of this case that we deem it pertinent to distinguish the *Marshman* case decided by this Court, May 31, 1960. The differences are fundamental and the similarities superficial. The instant case and the *Marshman* case have a common meeting ground retroactively, so to speak. In no respect do we believe there exists any real conflict. The retroactive meeting ground is *Freighting*[3] for the reason that it presents a factual picture closely analogous to the one here. It cites in support of its legal conclusion re taxable capital gain the *Mesta*[4] and the *Halliwell*[5] cases, and also *Kenan v. Commissioner*, 2 Cir., 114 F. 2d 217. In *Marshman, supra*, this Court disagrees with *Mesta* and *Halliwell*, those cases having dealt with property settlements in divorce actions. The *Kenan* case is not subject to the same infirmity, however, and is valid support for the taxable gain rationale in *Freighting*, which has direct application to the instant case. We reiterate what Judge Miller of this Court said in *Marshman* that if the property *received* "has no fair market value, or if such market value has not been shown, it may be economic gain but it is not taxable gain by reason of the express provision of Section 111(b)." *Marshman*, as well as *Mesta* and *Halliwell*, involved a propert settlement in a divorce action. Quoting from Judge Miller's opinion again:

> "A property settlement in a divorce proceeding is usually influenced and often dictated by numerous intangible, personal and practical considerations which play no part in a transaction between a willing seller

[3] Supra, 135 F. 2d 310.

[4] *Commissioner* v. *Mesta*, 3 Cir., 123 F. 2d 986.

[5] *Commissioner* v. *Halliwell*, 2 Cir., 114 F. 2d 217.

> and a willing buyer in the open market. The value of what is given up is no criterion of the fair market value of the 'property' received."

The truth of this observation is, of course, readily apparent. How different are the facts here. The value of what was given up here bears a direct relationship to the fair value of the "property" received. The "property" received is an economic gain to the taxpayer of exactly the market or assessed valuation which the taxpayer used as a deduction on its income tax returns. Again, in the *Marshman* case, this Court cites *Helvering* v. *Horst*, *supra*, and points out that the Supreme Court there was dealing with "the *realization* of economic gain, not the *valuation* of such gain" The difficulty inherent in the application of the economic gain theory in *Mesta*, in *Halliwell*, and in *Marshman* is directly related to the *valuation* of the gain rather than its *realization*. That difficulty is readily overcome in the matter herein. This is an arm's length situation. Emotional factors are not involved. The measurement of the intangible benefits is easily reduced to dollars and cents. We do not here have the *Marshman* "insurmountable obstacle to the application of Section 22(f) in conjunction with Section 111(a) and (b)." We experience no difficulty in accepting as the fair market value of the property received by the taxpayer the appraised valuation which the taxpayer took as a deduction on its income tax returns. This is consistent with the statement of Judge Miller in *Marshman* that "Under long-established rulings fair market value is the price at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell . . . A single transaction between a husband and wife made under the emotion, tension and practical necessities involved in a divorce proceeding does not comply with this rule." We have quoted the foregoing in order to point up the width

of the gulf between the considerations entering into *valuation* of transfers made in cases like *Mesta*, *Halliwell* and *Marshman* compared to the valuation of those effected in *Freighting* and in the instant case.

In accordance with the foregoing reasoning, we are of the opinion that the determination of the District Court that the taxpayer did not realize a taxable gain when it made the transfers and took the deduction for their fair market value was an erroneous one. The decision is therefore reversed and the judgment of the court below vacated.

JUDGMENT

September 2, 1960

APPEAL from the United States District Court for the Middle District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Middle District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and vacated.

Approved for entry:

s. THOMAS P. THORNTON
United States District Judge
(Sitting by designation)

No. 13,194

United States Court of Appeals

For the Sixth Circuit

UNITED STATES OF AMERICA, *Appellant*, v. GENERAL SHOE CORPORATION, *Appellee*.	ORDER on petition for rehearing en Banc Filed December 4, 1960.

Before: McALLISTER, Chief Judge, POPE, Circuit Judge, and THORNTON, District Judge.

The petition for rehearing en banc is denied. National Latex Products Co. v. Sun Rubber Co., 276 F. 2d 167. Therefore, the Court has considered said petition as a petition for rehearing.

It appears from a reading of the petition that it contains the same theories, authorities and arguments previously advanced. We do not perceive any new matter that this petition brings to our attention. There is emphasis placed on certain aspects of the case which are not germane to the issue. These we do not consider.

We believe that our opinion distinguishes the Marshman decision succinctly.

The petition for rehearing is denied.

Approved for entry.

/s/ THOMAS P. THORNTON
United States District Judge